

## 2007 Montana Legislature

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HOUSE BILL NO. 172

INTRODUCED BY M. CAMPBELL

BY REQUEST OF THE PUBLIC DEFENDER COMMISSION

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A STATEMENT BY A PERSON DURING CUSTODIAL QUESTIONING IS PRESUMED TO BE INADMISSIBLE IN EVIDENCE UNLESS IT IS ELECTRONICALLY RECORDED; PROVIDING GROUNDS FOR REBUTTAL OF THE PRESUMPTION; AND REQUIRING PRESERVATION OF THE RECORDING."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Recording of custodial questioning -- admissibility.** (1) As used in this section, the following definitions apply:

(a) "Custodial questioning" means the questioning in this state by a state or local government law enforcement officer of a person who is in custody and is questioned concerning an act, occurrence, or failure to act that is or may be a ~~criminal~~felony offense. Custodial questioning is questioning conducted in a law enforcement office or vehicle, courthouse, correctional facility, community correctional center, detention facility, health care facility, or any other place where adequate electronic recording equipment can be made readily available, whether or not the equipment is in fact available.

(b) "Electronic recording" means a complete and authentic recording created by motion picture, videotape, audiotape, or digital media.

(2) An oral, written, or sign language statement of a person made during custodial questioning is rebuttably presumed to be inadmissible in evidence in a criminal proceeding unless:

- (a) the custodial questioning was electronically recorded in its entirety;
- (b) at the start of the custodial questioning and electronic recording, the person was given the requisite Miranda warning and knowingly, intelligently, and voluntarily waived the rights referenced in the warning;
- (c) the electronic recording equipment was capable of making an accurate recording, the equipment operator was competent, and the electronic recording has not been altered;
- (d) each electronically recorded voice that is material to the custodial questioning is identified; and

(e) at least 20 days before the beginning of any trial or hearing in which it is contemplated that the electronic recording will be introduced in evidence, the defense attorney, or the defendant if the defendant does not have a defense attorney, is provided with a true, complete, and accurate copy of the electronic recording.

(3) The presumption of inadmissibility of the statement may be overcome by clear and convincing evidence that the statement was voluntary and reliable and that the law enforcement officer or officers conducting the custodial questioning had good cause for not electronically recording the custodial questioning. Good cause includes but is not limited to:

(a) custodial questioning conducted in a place where electronic recording equipment could not be made readily available;

(b) refusal of the person questioned to have the custodial questioning electronically recorded, and the refusal itself was electronically recorded; or

(c) equipment failure that resulted in the inability to electronically record the custodial questioning in its entirety.

(4) The electronic recording must be preserved until:

(a) the statute of limitations has run out for any offense for which the person might be charged;

(b) for any offense for which the person could be and was charged, the person was found not guilty; or

(c) for any offense for which the person could be and was charged, the person was convicted and all time for appeal, postconviction relief, and habeas corpus relief has passed and the conviction has become final.

(5) This section does not apply to a statement made in a judicial hearing or trial or before a grand jury or spontaneously made during or after the commission of an offense and not made in response to custodial questioning.

**NEW SECTION.** **Section 2. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 46, chapter 16, part 2, and the provisions of Title 46 apply to [section 1].

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\*\*\* Bill No. \*\*\*

Introduced By \*\*\*\*\*

By Request of the Office of the State Public Defender

A Bill for an Act entitled: "An Act amending section 46-15-322 MCA."

Be it enacted by the Legislature of the State of Montana:

**Section 1.** Section 46-15-322, MCA, is amended to read:

**"46-15-322. Disclosure by prosecution.** (1) Upon request, the prosecutor shall make available to the defendant for examination and reproduction, without cost when the defendant is represented by the Office of the State Public Defender, the following material and information within the prosecutor's possession or control:

(a) the names, addresses, and statements of all persons whom the prosecutor may call as witnesses in the case in chief;

(b) all written or oral statements of the defendant and of any person who will be tried with the defendant;

(c) all written reports or statements of experts who have personally examined the defendant or any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons;

(d) all papers, documents, photographs, or tangible objects that the prosecutor may use at trial or that were obtained from or purportedly belong to the defendant; and

(e) all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence.

(2) At the same time, the prosecutor shall inform the defendant of, and make available to the defendant for examination and reproduction, any written or recorded material or information within the prosecutor's control regarding:

(a) whether there has been any electronic surveillance of any conversations to which the defendant was a party;

(b) whether an investigative subpoena has been executed in connection with the case;  
and

(c) whether the case has involved an informant and, if so, the informant's identity if the defendant is entitled to know either or both of these facts under Rule 502 of the Montana Rules of Evidence and 46-15-324(3).

(3) The prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under subsection (1)(d).

(4) The prosecutor's obligation of disclosure extends to material and information in the possession or control of members of the prosecutor's staff and of any other persons who have participated in the investigation or evaluation of the case.

(5) Upon motion showing that the defendant has substantial need in the preparation of the case for additional material or information not otherwise provided for and that the defendant is unable, without undue hardship, to obtain the substantial equivalent by other means, the court, in its discretion, may order any person to make it available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would

be unreasonable or oppressive. The prosecutor may not be required to prepare or disclose summaries of witnesses' testimony.

(6) The prosecutor shall furnish to the defendant no later than 5 days before trial or at a later time as the court may for good cause permit, together with their statements, a list of the names and addresses of all persons whom the prosecutor intends to call as rebuttal witnesses to evidence of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity or the defense that the defendant did not have a particular state of mind that is an element of the offense charged."

{ *Internal References to 46-15-322:*  
*46-15-326\**}

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